

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



December 24, 2001

CA-10
1/23/2002

TO: PARTIES OF RECORD IN APPLICATION 99-08-034

This is the draft decision of Administrative Law Judge (ALJ) Kenney. It will be on the Commission's agenda at the next regular meeting 30 days after the above date. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the draft decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure." These rules are accessible on the Commission's website at <http://www.cpuc.ca.gov>. Pursuant to Rule 77.3 opening comments shall not exceed 15 pages. Finally, comments must be served separately on the ALJ and the assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

/s/ LYNN T. CAREW by psw
Lynn T. Carew, Chief
Administrative Law Judge

LTC:eap

Attachment

Decision: **DRAFT DECISION OF ALJ KENNEY** (Mailed 12/24/01)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of PACIFIC GAS AND ELECTRIC COMPANY (U 39 M) for an Order Under Section 853 of the California Public Utilities Code for an Exemption from the Requirements of PUC Section 851, or, Alternatively for an Order Under PUC Section 851 Approving 6 Sales Transactions for Certain Public Utility Properties. (U 39 M)

Application 99-08-034
(Filed August 16, 1999)

**DECISION GRANTING PACIFIC GAS AND ELECTRIC COMPANY
AN EXEMPTION FROM PUBLIC UTILITIES CODE SECTION 851**

I. Summary

This decision grants Pacific Gas and Electric Company's (PG&E's) application to exempt six transactions from Public Utilities Code § 851 pursuant to § 853(b).¹ We authorize this exemption because of unique and extraordinary circumstances. In other circumstances, an unauthorized sale may be deemed void.

II. Background

During an 11-year period ending in 1996, PG&E entered into 185 transactions involving the sale of utility assets to individual customers. In each case, the assets sold to the customer were used by PG&E to provide electric

¹ All statutory references are to the Public Utilities Code unless otherwise indicated.

service solely to that customer. The customers used the purchased assets to obtain primary, instead of secondary, electric distribution service. PG&E's rates for primary service are lower than its rates for secondary service.

The sale of utility property is governed by § 851, which states, in relevant part, as follows:

No public utility . . . shall sell . . . any . . . property necessary or useful in the performance of its duties to the public . . . without first having secured from the commission an order authorizing it so to do. Every such sale...made other than in accordance with the order of the commission authorizing it is void.

PG&E did not obtain Commission authority prior to consummating the previously described sales as required by § 851. PG&E believed at the time that the sales were exempt from § 851, since the assets, having been sold to the customers served by the assets, were no longer necessary or useful in the performance of PG&E's duties to the public. PG&E's understanding of § 851 changed with the issuance of Decision (D.) 96-02-054. In that decision, the Commission applied § 851 to the sale of utility assets by Southern California Edison Company to the sole customer served by the assets.

Following the issuance of D.96-02-054, PG&E filed two applications for approval of prior sales. In Application (A.) 98-08-018, PG&E requested authority for 106 transactions that occurred between 1989 and 1996. In A.99-01-001, PG&E requested authority for 73 transactions that occurred between 1985 and 1991. The Commission granted A.98-08-018 and A.99-01-001 in D.99-02-062 and D.99-04-047, respectively. In addition, the Commission in D.99-02-062 adopted the following recommendation by the Office of Ratepayer Advocates (ORA):

We agree with ORA that PG&E should be directed to conduct a reasonable search for any other . . . transactions that have been

made without Section 851 approval . . . We caution PG&E that transactions not brought before us for approval may, as a matter of law, be void or voidable. (D.99-02-062, *mimeo*. p. 8)

PG&E is directed to conduct a reasonable search for, and submit applications for approval of, past transactions . . . for which pre-approval has not been secured as required by Section 851. (D.99-02-062, Ordering Paragraph 3)

As required by D.99-02-062, PG&E searched for additional transactions that had occurred without prior approval. As a result, PG&E discovered six transactions that occurred in 1989, and sought Commission approval for these transactions by filing A.99-08-034, the application at issue in this proceeding. Each transaction involved the sale of electric distribution facilities to the sole customer served by the facilities. PG&E sold the assets for \$283,740, and realized a total gain of \$147,065 before taxes and transaction costs. PG&E used the proceeds to reduce its rate base. The reduction in rate base benefited ratepayers, since a lower rate base reduces rates, all else being equal.

In A.99-08-034, PG&E asks the Commission to use its authority under § 853(b) to exempt the six transactions from § 851. Section 853(b) states, in relevant part, as follows:

The commission may . . . exempt any public utility or class of public utility from [§ 851] if it finds that the application thereof with respect to the public utility or class of public utility is not necessary in the public interest.

PG&E states that if the Commission does not exempt the six transactions from § 851 pursuant to § 853(b), the asset sales will be void, thereby forcing PG&E and the purchasers or the purchasers' successors-in-interest to negotiate and execute new sales agreements. PG&E asserts that such an effort would benefit no one.

If an exemption is not granted, PG&E asks the Commission to grant retroactive authority for the sales under § 851. PG&E offers several reasons why such authority is warranted. First, the sales had no adverse impact on ratepayers, since the assets were sold to the customers served by the assets. Second, ratepayers benefited from the sales, since the sales proceeds were used to reduce rate base and rates. Conversely, had PG&E not sold the assets, the purchasers might have acquired similar assets from other sources, thereby idling PG&E's facilities. Third, § 851 provides that "any disposition of property by a public utility shall be conclusively presumed to be of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser...dealing with such property in good faith for value". PG&E represents that the purchasers acquired the assets in good faith and for value. Finally, the customers who purchased the assets have vacated the service locations, and their successors now occupy the sites and have succeeded to the assets. PG&E believes it would be unfair to unwind the sales and subject the current customers/owners to the problems inherent in trying to undo the past.

ORA states that ratepayers were not harmed by the asset sales, and that the gains from the sales were properly allocated to ratepayers. In light of these circumstances, ORA recommends that the Commission grant retroactive authority for the sales under § 851.

III. Discussion

In D.99-02-062, the Commission ordered PG&E to (1) search its records for previous sales of utility assets that occurred without authority from the Commission as required by § 851, and (2) file an application for approval of these sales. Implicit within this order was an indication that the Commission would approve the application if the sales were reasonable and in the public interest.

In this case, we find that the asset sales at issue in A.99-08-034 were reasonable and in the public interest. PG&E's ratepayers benefited from the sales, since the proceeds were used to reduce PG&E's rate base and rates. Conversely, if PG&E had not sold the assets, the purchasers might have acquired similar assets from other sources, thereby idling PG&E's facilities. PG&E's electric ratepayers would likely have borne the cost of the idle facilities and received no benefit in return. Furthermore, the sales did not harm PG&E's ratepayers because the assets sold by PG&E served only the customers who purchased the assets. Nor were other parties apparently harmed by the sales, since there were no protests to A.99-08-034.

PG&E admits that it sold the assets in question without Commission authority. Section 851 provides that a utility must obtain authority from the Commission to sell assets that are necessary and useful in the performance of the utility's duties to the public. Any sale of such assets that occurs without prior Commission authority is void pursuant to § 851. However, the Commission has authority under § 853(b) to exempt transactions from § 851. As a general rule, the Commission does not grant exemptions except in extraordinary situations.²

We find that the following circumstances collectively constitute an extraordinary situation that warrants our granting an exemption. First, the Commission implicitly indicated in D.99-02-062 that it would approve an application involving the unauthorized sale of utility assets if the sales were reasonable and in the public interest. We find that the sales were reasonable and in the public interest for the previously stated reasons. Consequently, it "is not

² D.99-04-047, *mimeo.* p. 7, and D.99-02-062, *mimeo.* p. 7.

necessary in the public interest” to deem the sales void. Second, the customers who purchased the assets from PG&E did so in good faith and for value. It would be unfair to force these customers or their successors in interest to now relinquish the assets. Finally, the sales occurred 12 years ago. Due to the passage of time, it is probably not possible, as a practical matter, to unwind the sales. For example, some of the assets may no longer exist.³ In addition, PG&E may not be able to locate the purchasers to unwind the sales, since the customers who purchased the assets have vacated their service locations.⁴

We emphasize we are using our authority under § 853(b) to exempt the asset sales from § 851 only because of the previously described extraordinary situation. In other circumstances that do not rise to an extraordinary situation, the unauthorized sale of utility assets will be deemed void as a matter of law.

We decline to adopt PG&E’s and ORA’s proposals to grant retroactive authority for the asset sales under § 851. The plain language of § 851 requires utilities to obtain Commission authority for an asset sale prior to consummating the sale. There is nothing in § 851 that allows the Commission to grant authority for a transaction *ex post facto*.

³ The physical condition of the assets that still exist has probably deteriorated due to normal wear and tear. There is little, if any, benefit to PG&E and its ratepayers in requiring PG&E to assume ownership of old and worn assets.

⁴ There is no evidence that PG&E’s failure to obtain prior approval for the sales under § 851 was caused by anything other than a sincere but mistaken belief that § 851 did not apply to the sale of single-customer facilities. Thus, our use of § 853(b) to grant an exemption from § 851 does not ratify egregious conduct. Had there been egregious conduct, we would not have granted an exemption under § 853(b).

IV. Procedural Matters

PG&E filed A.99-08-034 on August 16, 1999. Notice of A.99-08-034 appeared in the Commission's Daily Calendar on August 20, 1999. ORA filed a timely response on September 20, 1999.

In Resolution ALJ 176-3022, dated September 2, 1999, the Commission preliminarily categorized this proceeding as ratesetting, and preliminarily determined that hearing was not necessary. No party protested these preliminary determinations. Based on the record of this proceeding, we affirm that this is a ratesetting proceeding, and that a hearing is not necessary.

Section 311(g) requires the draft decision in this proceeding to be (i) served on all parties, and (ii) subject to at least 30 days of public review and comment prior to a vote of the Commission. The draft decision of Administrative Law Judge Kenney was mailed on December 24, 2001. Opening comments were filed on _____, by _____. Reply comments were filed on _____, by _____. These comments have been reflected, as appropriate, in the final decision adopted by the Commission.

Findings of Fact

1. In D.99-02-062, the Commission ordered PG&E to (i) search its records for previous asset sales that had occurred without Commission authority as required by § 851, and (ii) file an application for approval of such sales. PG&E filed A.99-08-034 in response to D.99-02-062.

2. In A.99-08-034, PG&E asks the Commission to exempt six transactions from § 851 pursuant to § 853(b), or, alternatively, grant retroactive authority for the transactions under § 851. The six transactions occurred in 1989, and involved the sale of assets that were necessary or useful in the performance of PG&E's duties to the public.

3. ORA recommends that the Commission grant retroactive authority under § 851 for the asset sales identified in A.99-08-034.

4. There is no opposition to the asset sales identified in A.99-08-034.

5. In Resolution ALJ 176-3022, the Commission preliminarily determined that this proceeding should be categorized as ratesetting, and that a hearing was not necessary. There was no opposition to these preliminary determinations.

Conclusions of Law

1. Section 851 requires public utilities to obtain authority from the Commission prior to selling assets that are necessary or useful in the performance of their duties to the public.

2. The asset sales at issue in A.99-08-034 were subject to § 851. PG&E failed to obtain prior authority for the sales as required by § 851.

3. The Commission has authority under § 853(b) to exempt transactions from § 851. The Commission grants such exemptions only in extraordinary situations.

6. D.99-02-062 implies that the Commission would approve the sales at issue in A.99-08-034, provided the sales were reasonable and in the public interest.

4. The asset sales at issue in A.99-08-034 were reasonable and in the public interest for the reasons set forth in the body of this decision.

5. For the reasons set forth in the body of this decision, there is an extraordinary situation that warrants the use of the Commission's authority under § 853(b) to exempt the transactions identified in A.99-08-034 from § 851.

6. Section 851 does not provide the Commission with authority to grant retroactive approval of transactions that are subject to § 851.

7. The following order should be effective immediately so that its provisions may be implemented expeditiously.

O R D E R

IT IS ORDERED that:

1. The six transactions identified in Application 99-08-034 are exempt from Public Utilities Code § 851 pursuant to § 853(b).
2. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.